DAVID A. ROSENFELD, Bar No. 058163
ADAM J. LUETTO, Bar No. 264188
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501-1091
Telephone 510.337.1001
Fax 510.337.1023

Attorneys for /Charging Party

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 21

In the Matter of: DIRECTV U.S.; DIRECTV HOLDINGS, LLC, Employer/Respondent and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 947, AFL-CIO. Charging Party	Case Nos. 21-CA-39546 **BRIEF IN SUPPORT OF CROSS EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE**

I. INTRODUCTION

This brief is submitted in support of the Cross Exceptions of the Charging Party. Charging Party Joins in the Brief in Support of the Exceptions filed by the Acting General Counsel and in those Exceptions.

II.

III. THE ADMINISTRATIVE LAW JUDGE INCORRECTLY FOUND THAT GREG EDMONDS LOST THE PROTECTION OF THE ACT.

In this case, the ALJ found that employees at the Riverside facility of Respondents DIRECTV U.S. and DIRECTV HOLDINGS, LLC (hereinafter, collectively "Respondent" or "Employer") regularly complained about having to wait in line each morning to be issued the

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

satellite television equipment need for the day's installations. (ALJ Decision, p. 7:30-34.) On July 21, 2010, while waiting among the other installers to get his materials, Edmonds said to the Operations Manager Freddy Zambrano (hereinafter, "Zambrano"), who happened to be walking by, "Freddy, can't you do something about this fucking line? I stand in this fucking line ten hours a day." (ALJ Decision, p. 8:14-15.)

When an employee is discharged purportedly for using obscene language to complain about working conditions, as did Edmonds in this case, the employee's conduct must be analyzed further to determine whether the employee's use of profanity caused the employee to lose the National Labor Relations Act's (hereinafter, the "Act") protection. *Atlantic Steel*, 245 NLRB 814 (1979). In *Atlantic Steel*, the Board identified four factors for evaluating whether employees have crossed the line: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and, (4) whether the outburst was, in any way, provoked by the employer's unfair labor practice.

In this case, the ALJ applied the *Atlantic Steel* factors, but incorrectly determined that Edmonds' remarks removed him from the protection of the Act. (ALJ Decision, p. 13:15-20.) Specifically, the ALJ found that Edmonds' comments took place in a workplace setting in the presence of 40 or 50 employees, who likely overheard his comments. (*Id.* at p. 13:8-9.) The ALJ further found that the subject matter of the comments was clearly a "longstanding matter of legitimate concern to all employees." (*Id.* at p. 13:9-10.) Finally, the ALJ concluded that Edmonds' comments, taken in the relevant context, "would tend to diminish Zambrano's status and authority in the eyes of other employees and have a deleterious effect on his 'right to maintain order and respect in the workplace,' and finally, Edmonds' outburst was not provoked in any way by Zambrano." (*Id.* at p. 13:15-18.)

The ALJ erred in his conclusion that Edmonds' comments fell outside the protection of the Act, because Edmonds' comments were well within the protection of the Act, under the analysis set forth in *Atlantic Steel*. First, while Edmonds' comments were made in a work area in the presence of other employees, the comments had no potential for disrupting production, since

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

the employees' actual work is performed at jobsites, not the warehouse where Edmonds' uttered his remarks. As such, the location of Edmonds' comments weighs in favor of protection.

Second, since Edmonds' comments related to a term or condition of employment, the subject matter of his comments favors of protection. In *CKS Tool & Engineering*, 332 NLRB 1578 (2003), the Board agreed with an administrative law judge's conclusion that an employee's outburst at a meeting about employees productivity was protected. As such, because Edmonds' statements to Zambrano involved working conditions, this factor favors finding his comments protected. Edmond's comments were concerted activity because he and others had regularly complained about the long wait. And since employees were paid in part on a piece rate system this affected their earnings.

Third, the nature of Edmonds' comments, even though they included profanity, did not disqualify them from protection under the Act. The employee's right to engage in concerted activity must permit some leeway for impulsive behavior especially when the intemperate language is part of the *res gestae* of the concerted activity. *Thor Power Tool Co.*, 351 F.2d 584 (7th Cir. 1965). In evaluating the nature of the employee's outburst, the Board looks at whether the profanity was brief or prolonged, and whether it was accompanied by insubordination, physical contact or a threat of physical harm. *Beverly Rehabilitation Services, Inc.*, 346 NLRB 1319, 1322-1323 (2006). The Board also considers whether the language used far exceeded that which was common and tolerated in the workplace. *Aluminum Company of America*, 338 NLRB 20, 22 (2002).

Because Edmonds' remarks were brief, amounting to no more than a few sentences, and were unaccompanied by insubordination, physical contact or threatened physical contact, this factor favors protection.

Finally and we believe most potently, the use of profanity was common in Respondent's warehouse. (See Tr. 35-38, 169-180, 234-235, 238, 240, 339-344.). The ALJ found that that "[s]uch or similar language was not unusual." ALD Decision p. 3:25. Furthermore the employer regularly condoned the use of such profanity. Once again this was found by the ALJ: "At no time

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

were employees told by supervisor Wilson to watch their language and sometimes Wilson also used such language." Edmonds had regularly used profanity before even with Zambrano and had never been warned or disciplined, ALJD p. 3: 11-8. The failure to warn or discipline Edmonds before surely creates a culture of profanity in the workplace which surely condones such conduct including Edmonds statement about the long wait in line. Surely then if such language was used and condoned, Mr. Edmonds' use of it is protected. Or at least it is discriminatory to fire him for use of profanity when supervisors have used profanity.

Edmonds' comments did not amount to insubordination, because they did not challenge the employer's authority to run the workplace by refusing to engage in production or perform a work assignment or otherwise serve to directly challenge Respondent's authority. See *Media General Operations, Inc.*, 351 NLRB 1324, 1326 (2007). Furthermore, Zambrano's response to Edmonds' remarks shows that Zambrano did not perceive that his ability to control the workplace was affected by remarks. Specifically, the ALJ found that after Edmonds complained, Zambrano approached him and spread his arms as if to block everyone and said, "Oh Greg. Nobody cut in front of Greg. Okay?" (ALJ Decision, p. 8:16.) If Zambrano had felt that his authority had been threatened, presumably he would not have made a joke about Edmonds' comments and then walked away, as he did. Thus Zambrano effectively condoned Edmond's statement because he made light of it and took no action. Thus, the nature of Edmonds' comments supports a finding that the comments were protected under the Act.

Finally, with respect to the last *Atlantic Steel* factor, the employer's conduct was in the context of unfair labor practices. The employer maintained unlawful rules in its handbook. Moreover the employer had made it clear to employees in the nearby Rancho Dominquez facility that it would not respect their choice to be represented by a Union.

The Board had conducted an election encompassing those workers on April 16, 2010 which Machinists District Lodge 947 had won but which had been set aside by a hearing office based on objections filed by the employer. The hearing officer's report was pending on exceptions. On December 22, 2011 the Board issued a decision reversing the hearing officer and

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

issuing a certification to the Union. See 357 NLRB No. 149 (2011). See footnote 5 of the ALJ Decision. The employer had refused to bargain over any issue. Region 21 has now issued complaint because Directv has refused to bargain and the motion for summary judgment is now pending before the Board. See Case 21-CA-071591

Since the employer did commit an unfair labor practice by refusing to bargain in the nearby Rancho Dominguez unit Edmonds and other workers had no other way to approach the employer and resolve this important workplace problem. This factor now weighs in favor of finding the activity protected. DIRECTV is a lawbreaker. It has violated the Act by refusing to bargain. It cannot justify its termination of Mr. Edmonds' complaint about working conditions when it refuses to deal with the Union.

Here the employer had a culture of profanity. Although the ALJ properly found that the termination of Mr. Edmonds violated section 8(a)(3), the termination also violates section 8(a)(1). The evidence presented at the hearing in this matter established that Edmonds' profanity did not cause him to lose the Act's protection, under the *Atlantic Steel* analysis.

IV. THE ADMINISTRATIVE LAW JUDGE SHOULD HAVE ORDERED RESCISSION OF THE UNLAWFUL RULES

The Charging Party excepts to the ALJ's failure to order rescission of Respondent's rules that are found to be unlawfully restrictive of employees' ability to engage in protected concerted activity.

The ALJ concluded that Respondent's handbook provisions, 3.4 Communications Representing DIRECTV and 4.3.1 Confidentiality, were "unlawful on their face, as they would reasonably tend to inhibit union or protected concerted activity by precluding employees from discussing wages, hours, and working conditions with employees and others, including union representatives, by precluding employees from contacting or conferring with representatives of the media, and by causing employees to be reluctant to contact the Board or deal with Board agents." (ALJ Decision, pp. 18:50-19:4, citing *Flamingo Hilton-Laughlin,* 330 NLRB 287 (1999); *Lafayette Park Hotel*, 326 NLRB 824 (1998).) The ALJ further found that Respondent's

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

Policy document provisions entitled Employees and Public Relations were "unlawful on their face as they would reasonably tend to inhibit union or protected activity by precluding employees from discussing wages, hours, and working conditions with employees and others, including union representatives, through the internet and by other means, and by precluding employees from contacting or conferring with representatives of the media. (ALJ Decision, p. 19:6-10.)

While the Charging Party agrees with the ALJ's conclusions concerning the unlawfulness of Respondent's rules, the Charging Party excepts to the remedy imposed by the ALJ. Specifically, the ALJ rejected the normal remedy that the unlawful rules "should be entirely expunged from the relevant documents." (ALJ Decision, p. 19:18-19.) The ALJ reasoned that to "[r]equire the Respondent to expunge the relevant provisions may unduly interfere with legitimate employer prerogatives" and that "[Respondent] has attempted in good faith to resolve this matter through its various postings." (ALJ Decision, p. 19:21-23.) The furthest the ALJ went was to order the parties "to explore modifications of the language or other alternatives during the compliance stage of this proceeding." (ALJ Decision, p. 19:23-24.) The ALJ's remedial conclusions are inadequate, insofar as the only appropriate remedy is complete rescission of the unlawful rules.

As the ALJ acknowledged, Respondent is a national employer with national rules (ALJ Decision, p. 19:19), and, as such, the rules found to be unlawful must be rescinded on a nationwide basis. There is no showing in the record that suggests that these rules are valid in any location over another, such that they must be ordered completely removed from publication in all locations. Rescission of unlawful work rules should be ordered on the level that the unlawful rules were publicized in the first place. See *Fredricksburg Glass and Mirror Inc.*, 323 NLRB 165 (1997); *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284 (2001), *Fresh & Easy Neighborhood Market*, 356 NLRB No 85 (2011)(notice physically posted in Las Vegas, posted nationally on intranet). Here, since the unlawful rules were published on a nationwide basis, it is necessary and appropriate, in order for the remedy to be effective and meaningful, to order rescission on a

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

nationwide basis. As such, the ALJ erred in failing to order the rules he found to be unlawful completely rescinded from all locations in which they were originally published.

Moreover the ALJ's direction that the parties "explore modifications of the language" is effectively a bargaining order. We do not challenge that order but find it strange.

V. THE ADMINISTRATIVE LAW JUDGE INCORRECTLY FOUND THAT THE RULE REGARDING USE OF COMPUTER SYSTEMS IS NOT UNLAWFUL

The Charging Party excepts to the ALJ's failure to find Respondent's handbook provision 21.4 "Use of Company Systems," unlawful, in light of the Acting General Counsel's position that *Register Guard,* 351 NLRB 1110 (2007) should be overruled. Respondent's handbook provision 21.4, Use of Company Systems, prohibits use of company property, namely company systems, equipment and resources, which includes the Respondent's email system, for purposes "of any religious, political, or outside organizational activity." (See ALJ Decision, p. 19:2-32.) This blanket prohibition unduly restricts union and protected concerted activities and must, therefore, be found unlawful and ordered rescinded.

Under *Register Guard*, employer bans on personal use of its property are apparently lawful as long as the employer does not discriminate against Section 7 activity. *Register Guard,* 531 NLRB 1110. However, the Acting General Counsel's position is that if an employer bans use of its property to support *all* outside organizations, it violates Section 8(a)(1) of the act because it reasonably tends to interfere with employees' right to engage in Section 7 activity. Under *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 802 n. 10 (1945), employees presumptively have a statutory right to use their employer's communications systems, subject to their employer's need to maintain production and discipline. Therefore, a rule that bans employees' personal use of such company equipment without a showing of special circumstances interferes with employees' Section 7 communication at work and is unlawful.

Respondent's handbook rule, 2.4 Use of Company Systems, is overbroad and unlawful under the *Republic Aviation* standard. The rule prohibits employee personal use of its equipment in support of any outside organization. It goes further and prohibits "personal use of company

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

property." Employees would most reasonably view the ban on using company communications equipment to support "any…outside organization activity," as including unions, and, therefore, clearly interferes with employees' rights to organize. Because no exception is made or can be inferred from the language of the rule, Respondent's maintenance of this rule violates Section 8(a)(1) of the Act and the ALJ's finding to the contrary is erroneous. Charging Party joins in the Exception of the Acting General Counsel on this point.

VI. THE RULES ARE INVALID TO THE EXTENT THAT THEY PROHIBIT THE EMPLOYEES FROM DISCLOSING COMPANY BUSINESS FOR PURPOSES OF BOYCOTTING AND OTHER LAWFUL CONCERTED ACTIVITY

The rules would prohibit individuals who work for the Company from disclosing company business for purposes of engaging in consumer boycotts. Employees are entitled to disclose upcoming sales, weaknesses in the business and other information which may allow a Union or the workers themselves to engage in lawful boycotting. Indeed they could disclose names of customers from whom a Union could seek support. The employer may have a right to forbid disclosure to competitors but it doesn't have a right to forbid the employees from disclosing information that may be useful for effective boycotting, picketing or strike activity. For example, employees have the right to disclose when a strike would be effective based on business conditions. They have the right to disclose this information in order to avoid a defensive lockout or even worse the hiring of scabs. A well timed job action based upon economic factors is the essence of section 7 activity. Avoiding the right of employers to hire scabs or lockout is equally justified. Unions and workers chose when to boycott and take economic action based upon information about an employer's business. The enforcement or maintenance of this provision cripples the union and gives the employer an unfair advantage as to when to time a lockout or other economic action. This language plainly prohibits disclosure of information which goes to the heart of effective economic action and is overbroad for this reason.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

VII. THE ADMINISTRATIVE LAW JUDGE'S REMEDY SHOULD BE MODIFIED IN VARIOUS OTHER RESPECTS

1. Here, since the unlawful rules were published on a nationwide basis, it is necessary and appropriate, in order for the remedy to be effective and meaningful, to order rescission on a nationwide basis. As such, the ALJ erred in failing to order the rules he found to be unlawful completely rescinded from all locations in which they were originally published.

2 The Notice should be posted for the same length of time between the time the unfair labor practices were first committed and the time the employer complies. It is time the Board impose an effective notice requirement that discourages respondents from delaying proceedings. The longer the proceedings are delayed the more likely those employees who are adversely effective will never see the Notice. Its value decreases with delay. As a result, in order to insure proper and meaningful posting, the Notice should be posted for the same length of time between when the first unfair labor practice is committed and when the employer begins compliance by posting the Notice.

In the alternative, the Board should require the Notice be posted for at least six months.

3. The Notice should be distributed to customers who should be aware of the unlawful conduct of the Respondent.

4. The Notice should be posted nationwide and wherever in the world the employer does business. It may have US employees in other facilities and they should be made award of this unlawful conduct.

5 The Notice should delete the reference to "refrain" since this is not an issue of the disability imposed on workers of the ability to refrain from section 7 activity.

////

////

////

////

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

VIII. CONCLUSION

For the reasons suggested above, these Cross Exceptions should be granted. Otherwise the Decision should be affirmed.

Dated: February 13, 2012

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /s/
DAVID A. ROSENFELD
Attorneys for Union/Charging Party

126468/655711

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

CERTIFICATE OF SERVICE

I am a citzen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the withing action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501. I certify that on, February 13, 2012 the was served on all parties or their counsel of record as listed below.

Served Via Email

Gregory D. Wolflick
Wolflick & Simpson
130 North Brand Blvd., Suite 410
Glendale, CA 91203

Email: greg@wolfsim.com

Served Via E-Filing

Chief Administrative Law Judge
National Labor Relations
Division of Judges
www.nlrb.gov

I certify under penaly of perjury that the above is true and correct.

Executed at Alameda, California, on February 13, 2012

/s/
Marveline Carrell

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001